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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 595

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

HENRY PLOUGH,
Respondent

No. 596

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

MARJORIE A. HANSON, AS ADMINISTRATRIX OF THE ESTATE OF GORDON M. HANSON, DECEASED,
Respondent

No. 597

BALTIMORE AND OHIO RAILROAD COMPANY,
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vs.

ELMER VAN SLYKE,
Respondent

No. 598

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Baltimore and Ohio Railroad Company, respectfully shows:

Summary Statement of the Matter Involved

On January 8, 1944, at a grade crossing of the petitioner railroad in Cattaraugus County, New York, a collision occurred between one of petitioner's trains and a truck owned by the Iroquois Gas Corporation (R. 29, 70-73, 188). In the truck at the time of the collision were Henry Plough, Elmer Van Slyke, Gordon Hanson and Myron Lynch, all employees of the Gas Corporation (R. 71, 73). Plough and Van Slyke received injuries as a result of the collision, and Hanson and Lynch were killed (R. 78, 128, 129, 347).

Actions in negligence were brought against petitioner in the United States District Court for the Western District of New York by Plough and Van Slyke individually, and by the estates of the decedents (R. 3-17). The said actions, although brought separately, were tried together before Hon. John Knight and a jury, resulting in jury verdicts of no cause of action in all four cases (R. 19, 20, 27).

Since all the occupants of the truck were acting in the course of their employment at the time of the accident, the Iroquois Gas Corporation as their employer was required to make payments under the New York State Workmen's Compensation Law to the surviving employees and to the estates of the decedents (R. 105, 107). Under the New York law the Iroquois Gas Corporation, the said employer, had a lien on the recovery in each of the actions herein for the amount of the compensation payments which it had made, and thus had a substantial financial interest in any verdict rendered in the actions (R. 106). Respondent Henry Plough, who was not seriously injured, had returned to work for the Gas Company prior to the trial of these actions and was so employed while the trial was in progress (R. 88, 103). He testified in each of the four actions herein, as plaintiff in his own case under questioning by his own attorney, and then as a witness for the plaintiffs in the other

three cases under questioning by their separate attorney (R. 70-83). Petitioner railroad introduced evidence of the Gas Company's above described interest in the outcome of the actions herein since it bore directly on the credibility of the Company's employee Plough (R. 92). The Trial Court admitted the testimony only for the purpose of showing bias on the part of such employee (R. 104, 107, 405).

The four judgments entered upon the jury's verdicts were appealed to the United States Circuit Court of Appeals for the Second Circuit and argued together before that Court (R. 23, 24, 413). The Circuit Court, Judge Swan dissenting, reversed the judgments below and directed new trials in all four actions (R. 413-421). Such reversal was based solely on the admission of the aforementioned impeaching testimony (R. 415, 416).

Petition for re-hearing was denied by the Circuit Court on November 21, 1947 (R. 426).

Jurisdictional Statement

Judgments in the four actions were entered by the Circuit Court of Appeals for the Second Circuit on the 5th day of November, 1947 (R. 418-421). The order of that Court denying petitioner's application for a re-hearing in all of said cases was filed on the 21st day of November, 1947 (R. 426). This Petition was filed on the 14th day of February, 1948. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code (28 U. S. C., § 347).

By its decision herein and the judgments entered thereon the Circuit Court of Appeals for the Second Circuit "has decided a federal question in a way probably in conflict with applicable decisions of this court." (Supreme Court Rule 38, Paragraph 5(b)). The United States Code, Title 28, § 734 and Rule 42(a) of the Federal Rules of Civil Procedure provide for the consolidation or joinder of trial of actions involving a common question of law or fact. This

Court has stated that such consolidation shall not deprive any defendant without its consent of any right material to its defense.

Mutual Life Ins. Co. v. *Hillmon,* 145 U. S. 285, 293, 12 S. Ct. 909, 36 L. Ed. 706;

Johnson v. *Manhattan Railway Co.,* 289 U. S. 479, 496, 53 S. Ct. 721, 77 L. Ed. 1331.

The right of a defendant to impeach the plaintiff's witnesses by introducing evidence of their bias is one that has long been recognized by the Federal courts. Nevertheless, the Circuit Court by its decision herein deprived petitioner of that right on the sole ground that the three actions, in which the plaintiff's witness was impeached, were consolidated for trial with a fourth action in which the said witness was himself the plaintiff.

Jurisdiction should not be denied herein because the judgments of the Circuit Court are not final adjudications of the merits of the respondents' claims. This Court has explicit authority to review the decision of a Circuit Court "either before or after a judgment or decree by such lower court." (28 U. S. C., § 347); and it properly allows a writ of certiorari where to deny it would merely protract litigation.

Spiller v. *Atchison, T. & S. Ry. Co.,* 253 U. S. 117, 121, 40 S. Ct. 466, 64 L. Ed. 810.

The Question Presented

Whether the defendant in an action shall be deprived of the right to show bias and prejudice on the part of a witness for plaintiff, solely because of the fact that the action, at the direction of the Court, is being tried jointly with another action brought by the said witness against the same defendant.

Reasons Relied Upon for Allowance of Writ

Judgments in favor of the petitioner herein were reversed by the Circuit Court on the sole ground that there was error by the Trial Court in admitting evidence offered by petitioner to attack the credibility of a witness for plaintiffs (R. 415-416). The Circuit Court recognized that under the rules of evidence applying in Federal courts the petitioner would have had an "undoubted right" to introduce such evidence had the actions herein been tried separately (R. 415). The Circuit Court held that the admission of the evidence in question was error solely because a joint trial was had of all four actions, *i. e.*, because the plaintiffs' witness whose credibility was being attacked on cross-examination by petitioner was also a plaintiff in one of the consolidated actions.

This Court held in

Mutual Life Ins. Co. v. *Hillmon (supra);* and.

Johnson v. *Manhattan Railway Co. (supra)*

that consolidations of actions shall not deprive a defendant without its consent of any right material to its defense. The decision of the Circuit Court herein is probably in conflict with those decisions of this Court.

Wherefore, your petitioner, Baltimore and Ohio Railroad Company, prays that a writ of certiorari issue to review the judgments entered in the above causes on the 5th day of November, 1947, in the United States Circuit Court of Appeals for the Second Circuit, said causes being Nos. 20591, 20592, 20593 and 20594 on the docket of the said Circuit Court.

Respectfully submitted,

Baltimore and Ohio Railroad Company,
By Wm. C. Combs,
Counsel for Petitioner.

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CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion in the United States Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Swan and Chase, Judge Chase writing, Judge Swan dissenting) was

filed November 5, 1947, and appears at pages 413 of the record. It is reported in 164 Fed. (2d) 254.

Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code (28 U. S. C., § 347). The Circuit Court of Appeals has in these cases "decided a federal question in a way probably in conflict with applicable decisions of this court." (Supreme Court Rule 38, Paragraph 5(b)).

Judgments were entered in these cases by the United States Circuit Court of Appeals for the Second Circuit on November 5, 1947. Petitioner's application for a re-hearing was denied by that Court by order filed on November 21, 1947.

Statement of the Case

The facts have already been set forth in the preceding petition at pages 1-5 and are hereby adopted and made a part of this brief. We emphasize only that the witness Plough, whose credibility was attacked by petitioner, testified first as party-plaintiff in his own case under questioning by his own attorney (R. 70-80) and then as a witness for the plaintiffs in the other three cases under questioning by the separate attorney for the plaintiffs in those cases (R. 80-83). He was then cross-examined both as a party and as a witness (R. 83-108).

Specification of Errors

The Circuit Court erred in holding that the petitioner could not impeach the testimony of the witness Plough, by showing the interest of his employer in the outcome of the actions herein, solely because of the fact that the three actions in which Plough appeared as a wit[illegible]r the plaintiff were consolidated for trial with a fou[illegible]n in which Plough himself was plaintiff.

ARGUMENT

Point I

The Impeaching Testimony Which the Circuit Court Rejected Would Be Admissible on Separate Trials of the Actions Herein.

The Circuit Court recognized petitioner's "undoubted right" under Federal rules of evidence to impeach witnesses for plaintiff by showing bias in the manner that was followed by the petitioner herein (R. 415). Numerous Federal decisions, including some of this Court, have established such right. See:

U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 47 S. Ct. 377, 71 L. Ed. 700;

Wabash Screen Door Co. v. *Black*, 126 Fed. 721 C. C. A. 6);

Mideastern Contracting Corp. v. *O'Toole*, 55 F. (2d) 909 (C. C. A. 2);

Paxson v. *Davis*, 65 F. (2d) 492, 62 App. D. C. 146 Cert. Den., 290 U. S. 643, 54 S. Ct. 61, 78 L. Ed. 558;

Eppinger & Russell Co. v. *Sheely*, 24 F. (2d) 153 (C. C. A. 5).

In *Sprinkle* v. *Davis*, 111 F. (2d) 925, the Circuit Court of Appeals for the Fourth Circuit admitted testimony identical in nature with that offered by the petitioner herein. It was in reliance upon the decision in that case that the Trial Court admitted the testimony in the instant actions (R. 88-97).

In *Majestic* v. *Louisville & N. R. Co.*, 147 F. (2d) 621, exactly the same testimony was offered; and the Sixth Circuit held it to be admissible. The Circuit Court below cited these cases wiht aproval (R. 415). There are no Federal cases holding to the contrary.

Point II

The Decision of the Circuit Court Herein Is Contrary to the Holdings of this Court that Consolidation Shall Not Deprive a Defendant of Any Material Right.

In *Mutual Life Insurance Co.* v. *Hillmon,* 145 U. S. 285, 293, 12 S. Ct. 909, 36 L. Ed. 706, this Court discussed the effect of consolidation in the following language:

> "But, although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

In *Johnson* v. *Manhattan R. Co.,* 289 U. S. 479, 496, 53 S. Ct. 721, 77 L. Ed. 1331, the Court said:

> "Under the statute, U. S. C., title 28, § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."

The Circuit Court in reversing jury verdicts for petitioner herein stated in part:

> "• • • we hold that it was an abuse of discretion to permit the introduction of evidence so prejudicial to the plaintiffs where the witnesses whose credibility was in question were parties to the litigation" (R. 416).

Unless the decision of the Circuit Court is reversed by this Court, petitioner, solely by reason of the consolidation of the actions herein, is thus deprived of a right material to

its defense, *i. e.*, the right to impeach the credibility of the plaintiffs' witnesses.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the judgments of the Circuit Court below.

WM. C. COMBS,
Counsel for Petitioner.

(4838)

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Supreme Court of the United States

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CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent.

ANSWERS TO WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

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ANSWERS TO WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF ANSWERS.

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Respondents for their answers to the petitions for Writs of Certiorari respectfully show:

Statement.

The summary statement of the matter involved contained in the petition for Writs of Certiorari is substantially correct.

However, Respondents will point out in their Brief in support of these answers that although it may be true, as is stated by Petitioners in the summary statement, on page 3 thereof, that "the Trial Court admitted the testimony for the purpose of showing bias on the part of such employee," that it appears very clearly from the testimony that the purpose of Petitioners in introducing the evidence was to prejudice the jury and the emphasis by Petitioners in the trial was upon *payment* of the insurance.

The statement as to the "jurisdictional matters involved," on pages 3 and 4 of Petitioner's petition, and summed up on page 4 thereof under the heading "The question presented," indicates a misapprehension on the part of the Petitioners that the decision of the Circuit Court of Appeals resulted solely from the fact that the actions were consolidated.

The Court itself makes no such finding nor can such interpretation be read between the lines. The Court's reason is given very clearly in its opinion in pages 415 and 416 of the addendum to the record on appeal, in which the Court said: "We think, however, that admission in this case was an unwarranted extension of the undoubted right to show bias on the part of the witness by proof of a fact otherwise entirely foreign to the issues and harmful."

The Court goes on to detail the reasoning in that respect. It is clear from the language of the Court that the mere fact that the cases were tried together had no bearing upon their opinion, but it relied clearly on the distinction, as

pointed out in Respondents' Brief, between the attempt to show bias of a witness and the unnecessary attempt to show bias of a party whose interest is freely admitted.

ARGUMENT.

POINT I.

The District Court erred in the first instance in permitting evidence of compensation insurance upon the trial and reversal upon this ground by the Circuit Court was sound.

The first intrusion into the case of the highly prejudicial reference to compensation insurance occurred in the cross examination of Plaintiff-Appellant Plough (P. 88, Fols. 263 and following).

> "Q. You are friendly with the Iroquois Gas Company as your employer, are you not? A. Surely.
> "Mr. Moore: He is not on strike anyway.
> "By Mr. Combs:
> "Q. (Resuming to witness) You do know, do you not, of your own knowledge, Mr. Plough, that all of the men, including the men on the truck, were covered by New York compensation?
> "Mr. Moore: I object.
> "Mr. Brock: I object.
> "Mr. Combs: The Court has a case covering that.
> "The Court: 147 Federal (2) 621. It is 5 o'clock. I think we will suspend at this time until 10 o'clock tomorrow morning.
> "(Whereupon, a recess was taken until tomorrow morning, Wednesday, December 4, 1945, at 10 o'clock.)"
>
> (Fols. 263-264.)

This is the kind of testimony that would call for a mistrial in any Trial Court. Not only was counsel for De-

fendant-Respondent able to get in at this point the fact that all the plaintiffs were covered by compensation and did not need a recovery in this action to make them whole, but the matter was further prejudiced by defendant's counsel stating, in the presence of the jury, that the Court had a case covering that point and by the Court's affirmation of the fact by appearing to give a legal citation of the case in the presence of the jury, thus giving the impression that the Federal Courts have sanctioned this very type of testimony.

The entire following discussion of the point in the Judge's chambers is printed in the record for the purpose of indicating the Court's interpretation of the case of *Sprinkle vs. Davis,* 111 Fed. 2nd 925, and also the agreement by counsel for the defendant that preclusion of this type of evidence by the New York State courts is a matter of substantive law (Fol. 277) all of which will be discussed at length below.

Compensation insurance is next mentioned in the continuation of the cross examination of Plaintiff Plough, on Page 104, folios 310-318.

It was the contention and the argument before the Court, and it will no doubt be made again before this Court, that the whole purpose of this testimony is to show that the Plaintiffs were friendly with their employer and that their testimony was biased in order to save the employer's money.

This point will be fully discussed below, but it appears particularly obvious from the following testimony that defendant's counsel was most anxious to have the jury know that the Plaintiffs were *paid* compensation and therefore did not need a recovery in this case.

In folio 310 Defendant's counsel, by his question brings out the fact that the Plaintiffs were all covered by Workmen's Compensation of the State of New York.

In folio 312 counsel pressed the point that Plaintiff Plough actually received compensation during his period of disability. (This clearly not on a question of bias but on question of actual compensation received.)

Further, in folio 312, counsel in the form of a question actually made the following exclamatory statement:

> "Q. Why, Mr. Plough, you appeared in Compensation Court before the Board and had an award made to you, and *were paid by the Iroquois Gas Company* your compensation by the State of New York?"

In the following folios the question is further labored, and again in folios 314-315 defendant's counsel insisted:

> "Q. You received it? A. Yes.
> "Q. That was paid by the Iroquois Gas Company, was it not? A. Yes, sir."

In Folio 316 Defendant's counsel again states:

> "Q. You know that money was paid by your employer? A. Mine was."

Under Folio 317 Defendant's counsel stated:

> "Q. Do you also know that Mr. Van Slyke will have to be paid under that law by the employer as long as he is disabled? Do you know that?"

In the summation to the jury by Mr. Combs, counsel for the Defendant (Fol. 1062 and following) he made a very great point of the interest of the employer, Iroquois Gas Company in this law suit.

Counsel for the Plaintiff Plough asked the Court to direct counsel for the Defendant to desist from continuing this line of argument and the Court (Fol. 1065) said: "As

the jury well knows, the Iroquois Gas Company is not a party. Otherwise I deny your request." This again was prejudicial error. Denial of this request again gave sanction before the jury to Defendant's attitude on the whole question of compensation and the interest of the employer, which clearly had no bearing upon the case.

The error in admitting the evidence of compensation insurance was imbedded even more deeply by the Court's charge (Fol. 1215), in which the Court says that this evidence was received solely on the question of credibility. He then goes on to say in the next paragraph: "If you arrive at a verdict in favor of the plaintiffs, no reduction should be made by reason of what you might assume was paid through any compensation act." This resulted again in emphasizing the fact that the Plaintiffs did receive payment of some kind for their injuries.

Apparently this evidence of compensation insurance was admitted by the Court as tending to show bias on the part of the Plaintiffs. The Court so stated as appeared in the printed discussion of the matter in the Judge's chambers and from his attitude in connection with the objections raised.

This was a complete misconception of the law and of the attitude of the Federal Courts in the few cases in which this type of evidence had been admitted. Where it has been admitted the Courts have been very careful to state that it was done to show the bias of a *witness*. Clearly there is no question of bias of a *party*. *A party has an interest which is far greater than bias.* Bias is merely an inclination. It is not necessary to prove the interest of a party, or that, to misuse the English language, he is biased n his own favor. The Court itself in this case charged the jury on the question of interest. (p. 396, Fol. 1187.)

"You may also take into consideration in considering the testimony of any witness,—whether Plough or Lynch, Van Slyke or any other, or Kessler,—the motive they had in testifying as they did. It is a natural result that if we have an interest, we may be inclined to represent the situation a little more favorably than one who has no interest."

Clearly the jury was warned that the parties had an interest and therefore the truth of their words must be weighed with that in mind. Will Defendant's counsel and the Court now say that we have come to that happy state in society in which an employee has a greater concern for his employer's interest than for his own?

Let us look at the cases. The case upon which Defendant's counsel relies and which was shown to the Court was *Sprinkle vs. Davis,* 111 Fed. 2nd 925. In that case the plaintiff, an employee of the Virginia State Highway Department, was injured by defendant's automobile. Defendant offered to prove that the injured man had received Workmen's Compensation payment as an employee of the highway department, contending that this fact should be made known to the jury in order to show the bias of other employees of the Department who testified for the plaintiff. The Circuit Court of Appeals for the Fourth Circuit held such evidence admissible, upon the principle that "parties to a cause have the right to show the bias and interest of the witnesses—Under this rule, the fact that a witness is employed by a party to the suit is regarded as a relevant circumstance".

Clearly what the Court meant in that case was that the bias of the witnesses, *other than the plaintiff,* could be shown by their employment. In our case the other witnesses are also parties whose interest is admitted. The same point

was raised in *Majestic vs. Louisville & N. R. Co.*, 147 Fed. 2nd 621, in which the Circuit Court of Appeals, 6th Circuit held that it was proper to ask a witness for the plaintiff, who was a co-employee, whether or not plaintiff was receiving compensation for his injuries. There the Court made the following interesting statement:

> "While the rule excluding any testimony or statement to the effect that a plaintiff in a personal injury action is insured against loss on account of the injury should be strictly adhered to and rigidly enforced, still, in applying it, the Court must give weight to the equally important rule of the undoubted right of a party to cross examine witnesses to show their interest or bias."

From this statement we gather clearly that the Court recognizes the importance of the principle preventing evidence of insurance, and will only permit this evidence in showing the bias of a *witness*. Surely the Court in that case would not have stultified itself in making the preamble which it did if the *witness* involved were a *party*. That, in effect, would be to say, "The rule excluding testimony that a party is insured should be strictly adhered to but in applying it the Court must also give weight to the right to cross examine a party to the action whose interest is obviously admitted to show that interest"—which would be to say that we can destroy a most valuable right in a party in order to prove that which has already been admitted.

In all the Federal Court cases, counsel for the plaintiffs has examined, the only instances of the relaxation of the rule permitting testimony as to compensation or other insurance has been to permit the evidence of bias of a witness, not a party.

See

Wabash Screen Door Co. vs. Black, 126 Fed. 721.

See

Eppinger & Russell Co. vs. Sheely, 24 Fed. 2nd 153.

That the Federal Courts have recognized the distinction urged here appears most clearly in *Majestic vs. Louisville & N. R. Co.* (*Supra*), in which the Court said:

> "Facts wholly immaterial or prejudicial to one of the parties on the main issue of a case may be material as affecting the credibility of a witness".

Obviously, the Court meant a witness, not a party. Therefore, it is clear that the Federal Courts themselves would not permit the admission of evidence of this kind.

It is almost unnecessary to review the vehemence with which the Courts of the State of New York have excluded such evidence. Perhaps the clearest statement in New York State appears in *Regan vs. Frontier Elevator & Mill Co.* (4th Department) 211 App. Div. 164; 208 N. Y. S. 239, where it stated:

> "Such insistence by defendant's counsel on the plaintiff's right under the Workmen's Compensation Law as occurred in this case might well influence the jury toward the erroneous view that the plaintiff's loss should find compensation in part at least from his employer under the provisions of that statute. Posnick v. Crystal, 181 App. Div. 660, 168 N. Y. S. 868. The situation is analogous to that which arises when reference is made on behalf of plaintiff to defendant's protection by insurance. The courts have long and consistently condemned such practice in vigorous terms."
>
> "We find no distinction in the fact that casualty insurance is wholly voluntary and workmen's compensation insurance compulsory. In either case the mat-

ter is equally immaterial to the judicial inquiry in progress. Neither are we impressed by the fact that the employer or his servants, if sworn, might be deemed interested witnesses, because of the provisions of the Workmen's Compensation Law. We deem such interest too remote to justify opening the gates to a flood of dangerous and illegitimate inferences and arguments to confuse the jury."

This is clearly a rule of substance in New York State and not purely one of evidence. This appears most clearly from the above cited case of *Regan vs. Frontier Elevator & Mill Co.* In that case the Appellate Court reversed for the admission of this evidence *even though the admission of the evidence was not objected to by the plaintiff.*

The Court said, at page 165:

"It is true that on neither occasion was a ruling made to which exception was taken. No question of law is presented by the record in this respect. But the very asking of an improper question for an ulterior purpose or the statement to the jury of extraneous prejudicial facts or argument may constitute such error of fact as to justify the Trial Court or Appellate Division in setting aside the verdict in the interests of justice."

See

Zimber vs. Kress, 225 A. D. 16 (232 N. Y. S. 46).

Posnick v. Crystal, 181 App. Div. 660 (168 N. Y. S. 868).

Coutts v. Christopher, 233 A. D. 136 (251 N. Y. S. 291).

It appears clearly from the decision in the above cited Regan case and the other cases referred to that it is clearly the policy of the New York State Courts to exclude this testimony and that it is more than a matter of mere evidence.

Certainly the United States District Court, sitting in New York, should follow this rule. See the ruling in *Tompkins vs. Erie R. Co.*, 304 U. S. 64.

It is further respectfully submitted that such a ruling is within the meaning of the Tompkins case, as interpreted by Honorable Charles E. Clark in *24 Journal American Judicature Society*, 158 (1941), in which it is stated that the Federal Courts are not required to hold that an issue traditionally procedural, or on the borderline, is substantive *unless the public policy of the State is unequivocally disclosed by some clear State statute or decision demanding such a result.*

There can be no doubt about the policy of the New York State Courts on this issue.

POINT II.

The decision of the Circuit Court is not dependent upon the consolidation of the actions.

The Circuit Court demonstrated no reliance whatsoever upon the fact that the cases were consolidated, but reversed because of unnecessary prejudicial evidence admitted.

The logic of the earlier decisions of the District Courts and of the Circuit Court in this case is clear.

This type of evidence is so highly prejudicial that if it be admitted at all it must be admitted only where there can be shown a strong supervening need in a particular case to impeach the witnesses to show their bias.

In this case it was a matter of fact that the witnesses, whom Petitioners sought to impeach, upon the ground of bias were all parties to the action and that obviously it

could serve no purpose to Petitioners to attempt to show any bias on their part inasmuch as they were admittedly interested parties.

No one will seriously claim that one's bias in favor of an employer is or can be greater than one's self-interest.

Hence, the type of evidence attempted to be adduced by the Petitioners was directed simply and surely to the jury's prejudice, namely, that these people have been paid once and should not be paid again. Such evidence could not serve a proper legal purpose and its admission was clear error.

It is respectfully submitted that these petitions for Writs of Certiorari should be denied.

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